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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 DirecTV Holdings, LLC,)
 DIRECTV Enterprises, Inc.)
 and USSB 11, Inc.)
)
 Petition for Administrative Sanctions)

File No. _____

**PETITION FOR
 ADMINISTRATIVE SANCTIONS
 OF THE STATE OF HAWAII**

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February 6, 2003

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SUMMARY

The Commission should impose administrative sanctions against DirecTV Holdings, LLC, DIRECTV Enterprises, Inc. and USSB II, Inc. (hereinafter “DirecTV”) for repeated and willful violation of the Commission’s geographic service rules for direct broadcast satellite (“DBS”) licensees. DirecTV began providing DBS service in June 1994 and for most of the past eight years has shown flagrant disregard of its obligation to provide DBS service to consumers in Hawaii

DirecTV is currently in violation of its geographic service requirements in two primary respects:

- First, DirecTV refuses to make available in Hawaii consumer reception equipment for its DBS service. As a result, DirecTV’s service is effectively unavailable to consumers in the State.
- Second, DirecTV’s programming packages in the State are objectively inferior and not even remotely comparable to the programming services that DirecTV makes available to all of its customers on the mainland. For example, DirecTV refuses to make available in Hawaii nine of the ten largest cable programming networks that DirecTV makes available to consumers in the continental United States.

Both the Commission and the State have warned DirecTV repeatedly of its obligation to provide DBS service to consumers in Hawaii. The Commission cannot condone through inaction DirecTV’s willful and ongoing violation of its rules. Instead, the Commission should impose administrative sanctions on DirecTV compelling the DBS licensee to come into compliance immediately with its geographic service obligations. Such sanctions should continue until DirecTV makes available in Hawaii DBS service that is reasonably comparable to the service that it provides to all of its customers on the Mainland.

TABLE OF CONTENTS

I.	INTRODUCTION2
II.	DIRECTV IS IN VIOLATION OF THE COMMISSION’S RULES BY REFUSING TO MAKE AVAILABLE IN HAWAII CONSUMER RECEPTION EQUIPMENT FOR ITS DBS SERVICE	3
III.	DIRECTV IS ALSO IN VIOLATION OF THE COMMISSION’S GEOGRAPHIC SERVICE RULES BECAUSE DIRECTV’S PROGRAMMING IN HAWAII IS OBJECTIVELY INFERIOR AND NOT EVEN REMOTELY COMPARABLE TO THE PROGRAMMING THAT DIRECTV MAKES AVAILABLE TO ALL OF ITS CUSTOMERS ON THE MAINLAND	5
IV.	ADMINISTRATIVE SANCTIONS ARE FURTHER WARRANTED AGAINST DIRECTV BECAUSE THE DBS LICENSEE HAS BEEN REPEATEDLY WARNED ABOUT ITS GEOGRAPHIC SERVICE OBLIGATIONS AND HAS WILLFULLY REFUSED COMPLIANCE	10
V.	CONCLUSION	13

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OF THE STATE OF HAWAII**

The State of Hawaii (“the State”),’ by its attorneys and pursuant to Sections 25.154 and 25.160 of the Commission’s rules: petitions for administrative sanctions against DirecTV Holdings, LLC, DIRECTV Enterprises, Inc. and USSB II, Inc. (hereinafter “Directv”) for repeated and willful violation of the Commission’s geographic service rules for direct broadcast satellite (“DBS”) licensees, as specified in Section 25.148(c) of the Commission’s rules³ and the Commission’s 2002 Report and Order in IB Docket No. 98-21.⁴

¹ The State herein comments through the Hawaii Department of Commerce and Consumer Affairs (“the Department”). A division of the Department – the Cable Television Division – is the State’s cable franchise administrator.

² See 47 C.F.R. § 25.154 (2001) (indicating requirements for petitions to deny and for petitions for other forms of relief); 47 C.F.R. § 25.160 (2001) (authorizing the Commission to impose administrative sanctions against satellite service licensees for, *inter alia*, failure to operate in conformance with any of the Commission’s rules and regulations).

³ See 47 C.F.R. § 25.148(c) (2002) (requiring DBS licensees acquiring DBS authorizations after January 19, 1996, or who after January 19, 1996 modify a previous DBS authorization to launch a replacement satellite, to provide DBS service to Alaska and Hawaii where such service is technically feasible from the authorized orbital location).

⁴ See *Policies and Rules for the Direct Broadcast Satellite Service*, FCC 02-110, ¶¶ 50-83 (June 13, 2002) (“*DBS Order*”).

I. INTRODUCTION

Directv is a Commission licensee, holding authorizations to operate a DBS network using 32 frequencies at the 101° W.L. orbital location, three frequencies at the 110° W.L. orbital location⁵ and 11 frequencies at the 119° W.L. orbital location.⁶ Directv was the first company to launch a DBS service in the United States, operating since June 1994.⁷ Today, Directv is reportedly the nation's largest DBS operator, claiming more than 10 million subscribers and an annual growth rate in excess of 10%.⁸

Despite Directv's more than eight years of growth, Directv has continually **and** willfully refused to comply with the Commission's geographic service rules. Directv has ignored repeated Commission orders reminding Directv of its geographic service obligations.⁹ Directv has also disregarded the Commission's 2002 *DBS Order* in which the Commission mandated "that DBS

⁵ See *United States Satellite Broadcasting Co., Inc. and DirecTV Enterprises, Inc.*, 14 FCC Rcd 4585 (Int'l Bur. 1999); *Hughes Communications Galaxy, Inc.*, 99 FCC 2d 1369, 1371, 1387, 1388 (1984).

⁶ See *Tempo Satellite Inc. and DirecTV Enterprises, Inc.*, 14 FCC Rcd 7946 (Int'l Bur. 1999); see also *DirecTV Enterprises, Inc.*, 7 FCC Rcd 2728 (Int'l Bur. 1992) and 7 FCC Rcd 6597 (Int'l Bur. 1992).

⁷ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, FCC 02-338, ¶ 59 (Dec. 31, 2002).

⁸ See *id.*

⁹ See, e.g., *DIRECTV Enterprises, Inc., Application to Launch and Operate a Direct Broadcast Satellite Service Space Station*, Order and Authorization, DA 01-2402, ¶ 12 (Int'l Bur. Oct. 26, 2001) (emphasizing that Directv would be required to revise its service offerings to comply with rules adopted in the DBS Order and cautioning that Directv's decision to provide local-to-local service "does not excuse DIRECTV from its service obligations to Hawaii"); *DIRECTV Enterprises, Inc., Application to Launch and Operate a Direct Broadcast Satellite Service Space Station*, Order and Authorization, DA 00-2381, ¶ 11 (Int'l Bur. Nov. 27, 2000) (reaffirming the Commission's commitment "to ensuring that residents of Hawaii and Alaska have access to DBS service" and reminding Directv that it will be required to revise its service offerings to comply with rules adopted in the *DBS Order*).

operators must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.””

Directv’s ongoing violation of the Commission’s geographic service rules exists in two primary respects. First, Directv refuses to make available in Hawaii consumer reception equipment for its DBS service. As a result, Directv’s service is effectively unavailable to consumers in Hawaii. Second, even if reception equipment was available, Directv’s programming packages in the State are objectively inferior and not even remotely comparable to the programming services that Directv makes available to all of its customers on the mainland. For each of these reasons, Directv is in willful violation of the Commission’s geographic service requirements and administrative sanctions are warranted.”

II. DIRECTV IS IN VIOLATION OF THE COMMISSION’S RULES BY REFUSING TO MAKE AVAILABLE IN HAWAII CONSUMER RECEPTION EQUIPMENT FOR ITS DBS SERVICE

Section 25.148(c) of the Commission’s rules requires Directv to provide DBS service to Hawaii where such service is technically feasible from the authorized orbital location.¹² In order to meet this requirement, Directv must not only broadcast to Hawaii DBS programming from its satellites, but it must also make available to consumers in Hawaii reception equipment that is capable of receiving Directv’s service.

¹⁰ *DBS Order*, ¶¶ 65; *see also id.*, ¶ 72

¹¹ *See id.*, ¶ 72 n.254 (indicating that DBS licensees will be subject to enforcement action and liability for failure to comply with the Commission’s geographic service requirements by October 6, 2002).

¹² *See* 47 C.F.R. § 25.148(c) (2002)

Directv distributes its DBS reception equipment over the Internet and through nationwide retail chains, such as Circuit City, Radio Shack, Blockbuster, WalMart and K-Mart.” All of these retailers operate stores in Hawaii. None of them, however, stock Directv equipment in their Hawaiian outlets.¹⁴ Directv claims that WalMart has two stores in Hawaii that carry Directv’s equipment, stating on its Internet site:”

Local Dealers

You can buy your DIRECTV System from any of the authorized local dealers listed below:

WAL-MART
94-595 KUPUOHI ST
WAIPAHU, HI 96797
(808) 688-0066
Click [here](#) to see a map

WAL-MART
95-550 LANIKUHANA AVE
MILILANI, HI 96789
(808) 623-6744
Click [here](#) to see a map

Personnel at both of these WalMart stores, however, say Directv’s Internet site is incorrect and they have never carried Directv’s equipment.¹⁶

Directv also sells consumer reception equipment for its DBS service over the Internet. When potential customers in Hawaii attempt to purchase the equipment on Directv’s website, however, they receive a message stating:



We are *sorry*, but you are unable to purchase equipment on our web site. Special equipment is required in your area. Please visit your local electronics retailer for more **information**.¹⁷

¹³ See *Hughes Electronics Corp.*, Security & Exchange Commission Form 10-K405 at 7 (March 11, 2002); www.directv.com/DTVAPP/buy/HowToGetDIRECTV.jsp (last visited Feb. 5, 2003).

¹⁴ See <http://www.directv.com/DTVAPP/DealerLocatorServlet> (last visited Feb. 5, 2003).

¹⁵ *Id.*

¹⁶ See *Affidavit of Clyde Sonobe*, Cable Administrator, Cable Television Division, State of Hawaii, at 1 (“*Sonobe Affidavit*”) (included as Attachment 1).

¹⁷ <http://www.directv.com/DTVAPP/HardwareHome.do> (last visited Feb. 5, 2003)

Of course, consumers in Hawaii can't visit local retailers for more information because, as explained above, there are no local retailers in Hawaii that carry Directv's service. As a result, Directv's service is entirely unavailable to consumers in the State and Directv is in clear violation of its unambiguous obligation "to provide DBS service to Hawaii." Therefore, administrative sanctions against Directv are fully warranted and appropriate.

III. DIRECTV IS ALSO IN VIOLATION OF THE COMMISSION'S GEOGRAPHIC SERVICE RULES BECAUSE DIRECTV'S PROGRAMMING IN HAWAII IS OBJECTIVELY INFERIOR AND NOT EVEN REMOTELY COMPARABLE TO THE PROGRAMMING THAT DIRECTV MAKES AVAILABLE TO ALL OF ITS CUSTOMERS ON THE MAINLAND

Directv is also in violation of the Commission's geographic service rules because the DBS licensee's programming packages in Hawaii do not even begin to compare with the programming that Directv makes available to all of its customers in the continental United States. As the Commission has clearly explained, "DBS operators must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states." Directv does not come close to satisfying this requirement.

Directv claims that it makes available in Hawaii two packages of programming: Hawaii Choice Plus, which includes 44 channels of video programming for \$21.99 per month, and Option Hawaii Plus, which includes 54 channels of video programming for \$23.99 per month." Both packages compare unfavorably on a pure 'price per channel' basis with Directv's primary Mainland offerings: Total Choice, which includes 84 channels of video programming for \$31.99

¹⁸ *DBS Order*, ¶¶ 65; see also *id.*, ¶ 72.

¹⁹ <http://www.directv.com/DTVAPP/learn/HawaiiProgramming.jsp> (last visited Feb. 5, 2003).

per month,²⁰ and Total Choice Plus, which includes 96 channels of video programming for ~~\$35.99~~ per month.²¹ Compared solely on price, Total Choice Plus costs just ~~37.5¢~~ per video programming channel on the Mainland, while Hawaii Choice Plus costs 33% more, or ~~50¢~~ per video programming channel.

The shortcomings with Directv's programming packages, however, are far more significant than price. As implied by its name, about half the video programming in Directv's Opción Hawaii Plus package is targeted for the Spanish-language market, a language not widely spoken in Hawaii.²² Furthermore, subscribers of Directv's Opcion Hawaii Plus package must purchase two satellite dishes, doubling the potential equipment costs, if, as discussed above, such equipment were available for purchase in the State.

More importantly, neither programming package includes the most popular and sought after video programming services that Directv makes available on the Mainland. As indicated in the following tables, Directv's subscriber packages in Hawaii exclude nine of the ten largest cable programming networks that Directv makes available on the Mainland. Furthermore, Directv's programming offerings in Hawaii exclude eight of the ten highest rated cable programming networks that Directv offers on the Mainland.

²⁰ http://www.directv.com/DTVAPP/learn/Packages_TotalChoice.jsp (last visited Feb. 5, 2003).

²¹ http://www.directv.com/DTVAPP/learn/Packages_TotalChoice_Plus.jsp (last visited Feb. 5, 2003).

²² According to the 2000 U.S. Census, 7.2% of Hawaii residents reported being of Hispanic origin. See <http://quickfacts.census.gov/qfd/states/15000.html> (last visited Feb. 5, 2003).

Top Ten Cable Programming Channels Ranked by Total Subscribers²³

Rank by Total Subscribers	Cable Programming Network	Carried by Directv on the Mainland	Carried by Directv in Hawaii
1	TBS Superstation	Yes	No
2	ESPN (1)	Yes	No
3	ESPN (1)	Yes	No
4	Cable News Network	Yes	No
5	Discovery Channel	Yes	No
6	TNT - Turner Network Television	Yes	No
7	USA Network	Yes	No
8	Nickelodeon/Nick at Nite	Yes	Yes
9	TNN – The National Network	Yes	No
10	A&E Network	Yes	No

Rank by Rating	Cable Programming Network	Carried by Directv on the Mainland	Carried by Directv in Hawaii
1	Lifetime Television	Yes	Yes
2	USA Network	Yes	No
3	TNT - Turner Network Television	Yes	No
4	Cartoon Network	Yes	No
5	TBS Superstation	Yes	No
6	Nickelodeon/Nick at Nite	Yes	Yes
7	A&E Network	Yes	No
8	Discovery Channel	Yes	No
9	WGN-C	Yes	No
10	TNN – The National Network	Yes	No

²³ See http://www.ncta.com/industry_overview/top20networks.cfm?indOverviewID=59 (last visited Feb. 5, 2003).

²⁴ See Annual Assessment of the **Status** of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, FCC 01-389, Table D-7 (Jan. 14, 2002) (citing Paul Kagan Assoc., Inc., *Day Part Rating Averages, Prime Time (3rd Quarter)*, Cable Program Investor, Sept. 11, 2001, at 6).

According to Directv's own experts, these top rated cable programming networks "are critically important to DBS firms in offering a *viable* alternative to cable providers."²⁵

Specifically, in the context of the Commission's recent Program Access proceeding, Directv's experts stated that

The fact remains that much of the most popular programming continues to be vertically integrated. For example, according to the FCC, four of the top six for-profit video programming networks ranked by subscribership are vertically integrated with a cable provider. In addition, three out of the top five video programming networks ranked by prime-time ratings are vertically integrated with cable firms. *These top channels (e.g., TBS, USA, TNT) are critically important to DBS firms in offering a viable alternative to cable providers. The lack of close substitutes for these top channels facilitates the effectiveness of anticompetitive foreclosure.*²⁶

Based on the comments and analysis of Directv and others, the Commission agreed, appropriately concluding in its Program Access proceeding that

a considerable amount of vertically integrated programming in the marketplace today remains "must have" programming to most MVPD subscribers. We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this "must have" programming, their ability to retain subscribers would be jeopardized.²⁷

Despite the Commission's conclusions, Directv is depriving consumers in Hawaii of not only some, but almost all of this "must have" programming. As a result, the Commission must conclude that Directv is in violation of its geographic service obligations. As the Commission

²⁵ *Reply Comments of Directv, Inc.*, CS Docket No. 01-290, at 7-8 (Jan. 7, 2002) (*emphasis added*) (quoting J. Orszag, P. Orszag and J. Gale, "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers," Jan. 2002, included as an attachment to *Directv's Reply Comments*).

²⁶ *Id*

²⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, FCC 02-176, ¶ 33 (June 28, 2002) ("Program Access Order").

correctly observed in its Program Access proceeding, “cable programming – be it news, drama, sports, music, or children’s programming – is not akin to so many widgets.”²⁸ Instead, consumers demand certain programming options and an operator’s failure to provide them “significantly harm[s]” that operator’s ability to compete with entrenched cable television networks.²⁹

The same conclusion must be made here. Directv’s programming packages in Hawaii are not even remotely comparable with the packages that Directv makes available to all of its customers on the Mainland because Directv refuses to make available in Hawaii almost all of the “must have” programming that is demanded by consumers. The Commission cannot permit Directv to argue in the Program Access proceeding that it cannot compete successfully without access to certain programming and then argue in this proceeding that such programming is irrelevant to consumers. Instead, the Commission must protect consumers by enforcing the letter and intent of its geographic service requirements.

The Commission adopted its geographic service rules in order to ensure that consumers in all fifty states would have a competitive alternative to entrenched cable television networks. In order to achieve this goal, the Commission cannot permit its largest DBS licensee to broadcast competitive cable programming to consumers on the Mainland, while intentionally supplying wholly inadequate programming packages to Hawaii. Instead, the Commission should enforce its long standing geographic service requirements by imposing administrative sanctions against Directv mandating that the DBS licensee finally come into compliance with the Commission’s rules.

²⁸ *Id.*

²⁹ *Id.*

IV. ADMINISTRATIVE SANCTIONS ARE FURTHER WARRANTED AGAINST DIRECTV BECAUSE THE DBS LICENSEE HAS BEEN REPEATEDLY WARNED ABOUT ITS GEOGRAPHIC SERVICE OBLIGATIONS AND HAS WILLFULLY REFUSED COMPLIANCE

Directv has been warned repeatedly of its obligation to provide DBS service to consumers in Hawaii. The Commission first placed DBS applicants on notice of their geographic service obligations in 1982, stating that it was creating the DBS service in order to advance its statutory goal of “providing equitable distribution of service throughout the nation.”³⁰ The Commission further clarified its position in 1991, stating that it was “determined to ensure that DBS service is provided throughout the country, including Alaska and Hawaii.”³¹

In 1995, the Commission adopted a two-part geographic service obligation that compelled DBS operators to serve Alaska and Hawaii, particularly using satellites and orbital positions acquired and launched after January 1996.³² The Commission reminded Directv of this obligation on a number of occasions.³³ Most recently, in June 2002, the Commission issued an order strengthening its geographic service requirements and warning DBS licensees that they would be subject to liability for failure to comply by October 6, 2002 with the updated rules.³⁴

The State has also attempted to focus Directv on its geographic service obligations. Most recently, the State sent a letter to Directv reminding the licensee of the effective date of the new

³⁰ *Direct Broadcast Satellites*, 90 FCC 2d 676, 680 (1982) (citing 47 U.S.C. § 307(b)).

³¹ See *Direct Broadcast Satellite Service*, 6 FCC Rcd 2581, 2582 (1991).

³² *Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995).

³³ See *supra* note 9.

³⁴ See *DBS Order*, ¶ 72 n.254.

rules and seeking information about Directv's compliance efforts.³⁵ Directv responded by claiming that its programming offerings in Hawaii are "reasonably comparable" to those that it offers in the Mainland "[g]iven the formidable technical and economic challenges involved in providing service to the State's residents."³⁶

Directv did not clarify what it meant by "formidable technical and economic challenges." It appears unlikely that Directv was making reference to its refusal to make available consumer reception equipment in Hawaii. As discussed above, Directv uses nationwide retail chains to distribute its service and all of them operate stores in Hawaii. .

It also appears unlikely that Directv was making reference to its refusal to make available nine of the ten largest cable programming channels to consumers in the State. The vast majority of Directv's programming – including the programming that it provides to Hawaii – is broadcast from four Directv satellites at the nominal 101° W.L. orbital position. The Commission has already concluded that it is technically feasible for DBS licensees to provide service to Hawaii from the 101° W.L. orbital position.³⁷ Consistent with this decision, some of Directv's four satellites at the 101° W.L. are already being used to broadcast DBS programming to the State, while other satellites – those with pre-1996 designs – reportedly are not technically capable of serving Hawaii.

³⁵ See Letter from Kathryn S. Matayoshi, Director, department of Commerce and Consumer Affairs, State of Hawaii, to Steven J. Cox, Senior Vice President, New Ventures, Directv, Inc (Sept. 26, 2002).

³⁶ See Letter from Christopher A. Murphy, Assistant general Counsel, Directv, Inc., to Kathryn S. Matayoshi, Director, department of Commerce and Consumer Affairs, State of Hawaii, at 2 (Sept. 26, 2002) ("Directv Letter").

³⁷ See DBS Order, ¶ 55

Thus, in order to provide a programming package in Hawaii that includes all of the ten most popular cable programming channels, Directv simply needs to move channels from its older satellites at 101° W.L. to its newer satellites at the same location. Directv would not need to re-point any customer receive dishes, *or* double illuminate any programming. Instead, Directv's claim of "formidable technical and economic challenges" appears to be completely unfounded.

In any event, the Commission's rules have been made abundantly clear. Directv is required to "provide DBS service to Hawaii where such service is technically feasible from the authorized orbital location."³⁸ As Directv has acknowledged, implicit in this requirement is the Commission's direction that "DBS operators must offer packages of services in Alaska and Hawaii 'that are reasonably comparable to what they offer in the contiguous 48 states'"³⁹

Directv is not providing programming to Hawaii from the 101° W.L. orbital position (or any other orbital position) that is reasonably comparable to the programming that it makes available to all of its customers on the Mainland. Since it is clearly technically feasible for Directv to do so, the Commission should conclude that Directv is in willful and ongoing violation of its geographic service rules. Furthermore, the Commission should impose administrative sanctions on Directv compelling the DBS licensee to come into compliance immediately with its rules. Any other outcome would be grossly unfair to the residents of the State of Hawaii.

³⁸ See 47 C.F.R. § 25.148(c) (2002)

³⁹ *Directv Letter* at 2 (quoting *DBS Order*, ¶ 65)

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Commission impose administrative sanctions on Directv in order to compel the DBS licensee to come into compliance immediately with the Commission's geographic service rules.

Respectfully submitted;

THE STATE OF HAWAII

By: 

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**AFFIDAVIT
OF CLYDE SONOBE**

1. I, Clyde Sonobe, ~~am~~ the Administrator for the Cable Television Division of the Department of Commerce and Consumer Affairs for the State of ~~Hawaii~~.
2. As a part of my duties, I ~~caused~~ my staff to contact personnel with the Wal-Mart stores in Waipahu and Mililani and to inquire about the availability of equipment and service for Directv's direct broadcast satellite service.
3. Personnel at both of these Wal-Mart stores ~~informed~~ my staff that they do not stock equipment for Directv's DBS service and have never stocked such equipment.
4. ~~The~~ personnel also informed my staff that they are ~~aware~~ about the information being provided on Directv's Internet site ~~regarding~~ the availability of the equipment at their stores, but that information is in error.

A handwritten signature in cursive script that reads "Clyde S. Sonobe".

Clyde Sonobe
Administrator
Cable Television Division

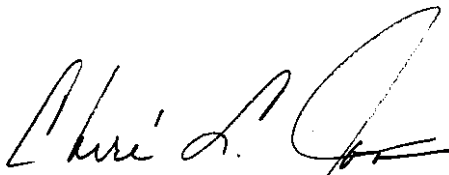
February 5, 2003

Certificate of Service

I, Chere L. Jones, hereby certify that a copy of the foregoing Petition for Administrative Sanctions of the State of Hawaii was hand-delivered this 6th day of February, 2003 to the following:

James H. Barker, 111, Esquire
Latham & Watkins
555 11th Street, **NW**, Suite 1000
Washington, D.C. 20004-1304

Merrill S. Spiegel
DIRECTV, Inc.
1530 Wilson Boulevard, Suite 1000
Arlington, VA 22209

A handwritten signature in black ink, appearing to read "Chere L. Jones", written over a horizontal line.

Chere L. Jones